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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 453

LEHIGH VALLEY RAILROAD COMPANY, a corporation,

Plaintiff-Respondent,

vs.

MARY CHAPMAN, deceased, late of Perth Amboy and her heirs, devisees and personal representatives and those of any of their unknown executors, administrators, grantees, assignees or successors in right, title and interest, and all persons claiming by or through her or any of them, MARY HUSSEY BEARDSLEY, widow, ROBERT V. B. HORTON and ELIZABETH B. HORTON, his husband, MALCOLM CAMPBELL and [illegible] his wife, HELENA B. CAMPBELL, RUTGER DEY and THOMAS M. DEY, his husband, HELEN B. MANCHEE, individually and as executrix of the last will of Helena B. Campbell and as executrix of Anna Lloyd Bowyer, and RICHARD B. MANCHEE, her husband, FIRST NATIONAL IRON BANK OF MORRISTOWN, as executor of the last will of Helena B. Campbell and as guardian of Anna Lloyd Bowyer, and as executor of the last will of KATHERINE N. BOWYER, ALIDA BEAVOR HOUSMAN, KATHERINE B. STRONG individually and as executrix of the last will of KATHERINE N. BOWYER and JOHN VR. STRONG, her husband, HORACE HEPBURN as executor of the last will of KATHERINE N. BOWYER, ANTHONY RUTGERS NELSON and MARY NELSON, his wife, HELEN N. BENT and CHARLES BENT, her husband, JOSTAN C. HALVORSEN, sued as FLORENCE ROBINSON, trading as FORDS PORCELAIN WORKS, INC., and all persons claiming by or through them or any of their unknown heirs, devisees and personal representatives, and those of any of their unknown successors in right, title and interest,

Defendants-Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR RESPONDENT

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MARY CHAPMAN, deceased, late of Perth Amboy and her heirs, devisees and personal representatives and their or any of their heirs, devisees, executors, administrators, grantees, assigns or interest, and any and all persons claiming by or through them or any of them; MARY HUSE BEARDSLEY, widow; ROBERTA B. HORTON and LUCIAN B. HORTON, her husband; MALCOLM CAMPBELL surviving spouse of HELENA B. CAMPBELL; RUTH N. DILL and THOMAS M. DILL, her husband; HELEN B. MANCHEE, Individually and as co-trustee u/l/w/t of HELENA B. CAMPBELL and as co-guardian of ALIDA BEACH BONSALL, and RICHARD B. MANCHEE, her husband; FIRST NATIONAL IRON BANK OF MORRISTOWN, as co-trustee u/l/w/t of HELENA B. CAMPBELL and as co-guardian of ALIDA BEACH BONSALL and as co-trustee u/l/w/t of KATHERINE N. BONSALL; ALIDA BEACH BONSALL; KATHERINE B. STRONG, Individually and as co-trustee u/l/w/t of KATHERINE N. BONSALL and JOHN VR. STRONG, her husband; HORACE JEFFERS, as co-trustee u/l/w/t of KATHERINE N. BONSALL; ANTHONY RUTGERS NIELSON and MARY NIELSON, his wife; HELEN N. BENT and CHARLES BENT, her husband; ROSLYN C. HALVORSEN, widow; FLORENCE ROBINSON, widow; FORDS PORCELAIN WORKS, INC.; and unknown claimants and their heirs, devisees and personal representatives, and their or any of their successors in right, title and interest,

Defendants-Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Supreme Court of New Jersey, No. A-108, decided June 5, 1961, is reported in 35 N. J. 177 (1961) and 171 A. 2d 653.

Jurisdiction

1. Respondent denies that the validity of a state statute is here drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or that any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States. It, therefore, denies that the jurisdiction of this Court is properly invoked under 28 U.S.C.A. sec. 1257(3). It further denies that the cases cited by petitioners, in which this Court reviewed decisions of lower Federal Courts, support petitioners' claim that this Court has jurisdiction under 28 U.S.C.A. sec. 1257(3).

2. Respondent denies that any constitutional question here exists or that any such question was properly raised or preserved in the state court or that any such question was considered or decided either directly or by implication by the state court.

Questions Presented

1. Is any substantial constitutional question involved in the holding of the state court that petitioner had a fee simple absolute title to certain lands which were condemned under the provisions of the special charter of its predecessor in title (L. 1872, c. 110) in 1873?

2. If a constitutional question is involved and the jurisdiction of this court sustained, was the question properly raised and preserved below?

Statement of the Case

1. Respondent agrees with petitioners' "Statement of the Procedural History of the Case."

2. It believes that petitioners' "Statement of Facts Material to the Question Involved" is in many respects

both incomplete and inaccurate. A counter-statement follows:

Under section 1 of its special charter respondent's predecessor was authorized to hold and convey lands without restriction. Section 8 of the charter provided that said predecessor could agree with owners for the purchase of land needed. The section also provided a method for condemning the land in the event of a failure to agree. In 1873 respondent's predecessor required a portion of the lands of Mary Chapman for its right of way. It could not agree on a purchase of said land and the procedure for condemnation was duly followed and Mary Chapman was awarded the full value of her property which was condemned.

Approximately 86 years later respondent believed the subject land was no longer required for railroad purposes and it contracted to sell it to an industry which had a use for it. The contract was, of course, subject to obtaining the required permission of the New Jersey Board of Public Utility Commissioners.

Both the trial and appellate courts of New Jersey held that the legislature could properly authorize the acquisition by a quasi-public corporation in condemnation of a fee simple absolute, that the language of the subject special charter authorized the acquisition of an absolute fee, that the use for which the land was acquired and the fact that Mary Chapman was awarded full payment for her entire interest in the subject land, all indicated that, in fact, an absolute fee was acquired by respondent's predecessor and that petitioners had no interest in the subject land.

3. Respondent denies that a federal question was raised before the New Jersey courts. No mention is made of any such question in the pleadings. No such question was presented to or argued before the trial court. Petitioners

main brief to the appellate court does not include discussion of any such question. No such question was mentioned in respondent's answering brief. It first appears (improperly we claim) in petitioners reply brief. No such question was decided by the appellate court or even discussed in its opinion. Furthermore, the Attorney General of the State of New Jersey was not joined in the proceeding nor was he given any notice as required when the constitutionality of a state statute is involved.

ARGUMENT

POINT I

No constitutional question arises in the instant case.

Petitioners do not and can not claim that any interest to which they are entitled was taken without just compensation. For their predecessor in title received just compensation for her entire interest in the subject property.

Nor should petitioners be able to claim that the state court had no right to construe the subject special charter as empowering the railroad to acquire an absolute fee. For the construction of a state statute is clearly and peculiarly within the judicial province of the state court.

Their claim, as we understand it, is that, as construed, the subject special charter contravenes the due process clause of the Fourteenth Amendment for the reason that the legislature could never empower a railroad to acquire an absolute fee title to lands required for a right of way by eminent domain.

No authority is cited to establish such a constitutional limitation on legislative discretion and the proposition is clearly opposed to the rule that questions of the extent, amount or title of property to be taken on condemnation rests wholly in the discretion of the legislature, subject

only to the restraints that just compensation must be paid and the determination made in good faith. See *U. S. v. Meyer*, 113 F. 2d 387, cert. denied; *Meyer v. U. S.*, 311 U. S. 706.

There is no excess of condemnation involved in the sense that no more land was taken than needed. The question raised is limited to the quality of title and not the quantity of land.

We see nothing in the due process clause of the Fourteenth Amendment which prevents a state legislature from allowing a railroad to acquire by condemnation title to land of the same quality as it could acquire by purchase and agreement. We see no benefit to a condemnee in being forced to retain without compensation some sort of reversionary interest based on some indefinite and indefinable condition. On the contrary for respondent to be required now to forfeit some interest in land for which its predecessor has fully paid may constitute a taking of its property contrary to the due process clause of the Fourteenth Amendment.

POINT II

No constitutional question was properly raised or preserved in the state court.

The state appellate court was silent in its opinion with respect to any federal question. The burden is, therefore, on petitioners to show that such question was properly raised of record.

The fact is that the constitutionality of the special charter, as construed, was first mentioned in petitioners reply brief in the appellate court. Because respondent's answering brief mentioned no such question, it was improperly raised in the reply brief. Furthermore, no constitutional question had previously been raised in the pleadings in the trial court or in the main briefs.

New Jersey rules of court (R.R. 4:37-2) provide as follows:

> "When the validity of a statute, executive order, franchise or constitutional provision of this State is drawn in question in any action to which the State or an officer or agency thereof is not a party, the court shall require notice be given the Attorney General of the State; and the State shall upon timely application be permitted to intervene in the action. When the validity of an ordinance, regulation or franchise of a governmental subdivision of this State affecting the public interest is drawn in question in any action to which the governmental subdivision or an officer or agency thereof is not a party, the court shall require notice be given the county counsel, city counsel, corporation counsel, or other chief legal officer of the subdivision thereof affected; and the subdivision shall upon timely application be permitted to intervene in the action."

No notice was given to the Attorney General of the State as required.

We, therefore, submit that the question as to the constitutionality of the subject special charter was not raised or preserved in the state court.

CONCLUSION

Respondent respectfully submits that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

CHARLES W. HUTCHINSON,
Counsel for Respondent.